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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 500

THOMAS J. CASEY, *Petitoner,*

vs.

THE UNITED STATES, *Respondent.*

PETITION FOR WRIT OF CERTIORARI.

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT. AFTER HEARING AND DECISION

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TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT. AFTER HEARING AND DECISION

To The Honorable the Supreme Court of the United States:

The petition of Thomas J. Casey respectfully shows to this Honorable Court:

That a Writ of Certiorari should be directed to the United States Circuit Court of Appeals for the Ninth District, to review a decision made by that court on June 27, 1927, rehearing denied August 1,

1927, affirming a judgment of the United States District Court for the Western District of Washington, Northern Division, wherein petitioner was adjudged guilty of violating the Harrison Narcotic Act and sentenced to fourteen months imprisonment.

SUMMARY STATEMENT

1. That petitioner has practiced law at Seattle, Washington, for 24 years, and prior to the prosecution, of which this petition is the outgrowth, was never charged with any offense. That he enjoyed an unblemished personal and professional reputation. That on February 24, 1926, the grand jury indicted defendant on two counts as follows:

"COUNT I.

"That THOMAS J. CASEY, on the 31st day of December, A. D. 1925, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, wilfully and feloniously, and not in the original stamped package, nor from the original stamped package, purchase from a person whose name is to the grand jurors unknown, a quantity, to-wit, 3.4 grains of a certain compound, manufacture, salt, derivative, and preparation of opium, to-wit, morphine, contrary to the form of the statute, etc."

"COUNT II.

"That THOMAS J. CASEY, on the 31st day of December, A. D. 1925, at the City of Seatle, in the

Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, willfully, unlawfully, and feloniously manufacture, produce, compound, sell, deal in, dispense, distribute, administer and give away a certain compound, manufacture, salt derivative, and preparation of opium, to-wit, morphine, without having registered and paid the special tax as required and imposed by law; contrary to the form of the statute." etc. (Tr. 2-3).

SYNOPSIS OF EVIDENCE

1. There was no proof whatever in support of Count I. The whole effort of the prosecution was to prove, not a purchase, but a sale of 3.4 grains, without alleging it. The Government's case tended to show that petitioner, (hereafter called defendant), had been visiting the King County Jail for many years, the same as other attorneys, and had defended several—though only a small percentage—of the narcotic cases. (Tr. 29).

2. December 29, 1925, narcotic agent, W. J. Patterson, whom defendant had denounced for theft and perjury in two former cases, secured permission from Jailor Stark to install a dictaphone in the jail to hear defendant's conversations with his clients. He then asked Stark to phone for defendant to come and see George Cicero, (a stool pigeon for Patterson), and one Roy Nelson. They lay in wait for defendant three days. He finally came and interviewed these men.

(Tr. 33). Patterson had placed $20 to Cicero's credit and directed the latter to give defendant an order for it. (Tr. 57). Nelson gave defendant an order for $50, but was not called as a witness, nor was he permitted to testify for the defendant.

3. At 1:45 P. M. on December 31, 1925, an alias, Francis V. Nelson, who worked under Agent Patterson, obtained a package of laundry from Patterson or some one else, in or near the narcotic office—where they used green ink. It is contended the 3.4 grains of morphine was ironed into the laundry. She initialed the package with green ink: "F. V. Nelson, 1:45 o'clock, December 31, 1925." (Tr. 51, 78). Forty-five minutes later she first went to defendant's office with the laundry package to induce him to take it to the jail. He was not in. She went back in 20 minutes and found him. (Tr. 44). She asked defendant to take the package to the jail for her alleged brother-in-law, Roy Nelson. He refused. (Tr. 77-8). She then claimed that defendant gave her the package, and wrote on it in her presence: "Roy Nelson, King County Jail." (Tr. 44). Defendant refuted this by two witnesses besides himself, who saw her enter his office with the package, and leave the office with the same package. (Tr. 69, 72). She admitted she left his office and brought the package *BACK* to the Narcotic office—where she got it at 1:45 P. m. (Tr. 42).

4. There was no positive or satisfactory identification by any witness, of the alleged 3.4 grains of morphine. The Government's case tended to show that

defendant promised to obtain morphine for the alleged addicts in jail. But there was no showing that he ever obtained, or had, any. His office was thoroughly searched by three narcotic agents at 8 o'clock that night. No trace or sign of narcotics could be found. (Tr. 39). At the same time Patterson took a deputy marshal to defendant's home and placed him under arrest. Demanded $10,000 bail from him late in the evening prior to a holiday. (Tr. 79).

Defendant testified:

"I asked Patterson what this was all about. I told my wife I would be back in 2 or 3 hours. She did not know I was under arrest. I asked Patterson to take me to Williamson's office, narcotic chief. I said I was ready to tell everything and straighten the matter out. I had done nothing to go to jail for. Patterson would give me no information. He said *you are going to jail now.* You are under $10,000 bail. I asked why such an enormous bond. Patterson told Jailor Barr not to let Casey talk to anybody. I asked Barr to let me phone my wife, but he refused. I was never in any trouble or accused of any crime prior to this. I never sent any narcotics to the jail and never was a party to sending any. I never purchased in this district or elsewhere opium or 3.4 grains of morphine or any other amount. I never told Cicero that I would send him morphine, and he knows I would not. . . . I had nothing to conceal. I talked in a normal tone of voice. Nelson paid me the money absolutely as a retainer and that was the only purpose I received it for. The $20 Cicero paid me was part of my fee. He was to pay me $100." (Tr. 75).

5. Defendant was tried in June, 1926. At the close of the case he challenged the sufficiency of the evidence and asked for an instructed verdict of not guilty on each of the two counts. (Tr. 83-4).

The jury was out all night. On the first ballot eight voted for acquittal. Later one juror informed the others that from certain information he claimed to have, in his possession (not known by the other eleven) he knew defendant's system of hand writing and was satisfied that defendant wrote the disputed words: "Roy Nelson, King County Jail," on Exhibit "10," and that the other jurors *could take his word for it.* (Tr. 89).

After verdict defendant moved an arrest of judgment and for a new trial. The motion in arrest was overruled July 3, 1926: that for a new trial September 20, 1926.

Thereafter defendant duly sued out a writ of error to the Ninth Circuit Court of Appeals, which, after hearing, rendered the decision which your Petitioner now asks to have reviewed.

REASONS FOR ISSUING THE WRIT

The decision in the instant case, holds that the possession of 3.4 grains of morphine, though disputed, and such an amount as any consumer might lawfully possess, is prima facie evidence of a violation of the Harrison Act. That an *unlawful purchase* may be presumed from *possession* alone of such small amount. That this presumption *includes the venue*—the *place* of purchase.

This holding is in direct conflict with decisions on the identical question in the Seventh and Eighth circuits.

See, *Brightman v. U. S.,* 1 Fed (2d) 532. *Cain v. U. S.,* 12 Fed. (2d) 580. *Hood v. U. S.,* 14 Fed (2d) 925. *DeMoss v. U. S.,* 14 Fed. (2d) 1021.

Judge Rudkin withheld assent on this point. (Tr. 113).

COUNT II.

It is admitted the second count is "purely a blanket charge." That it is defective and misleading, but it is held sufficient. The count deals with *registration.* There is no charge that the defendant was dealing in *stamped drugs.* In the Sixth and Eighth circuits it has been held that unless the indictment charges that a defendant is dealing in *stamped,* as distinguished from *un*stamped, drugs, it does not charge a crime.

See, *Weaver v. U. S.,* 15 Fed. (2d) 38. *O'Neill v. U. S.,* 19 Fed. (2d) 322.

The decision in the instant case being in direct conflict with decisions in other circuits on identical questions, in each count, the writ of certiorari should be issued as prayed for.

ERROR AND CONFLICT

Petitioner respectfully submits that the Circuit Court of Appeals erred as follows:

1. In affirming the judgment of the District Court.
2. In holding that Count I was sufficient for any purpose.
3. In holding that Count II was sufficient for any purpose.

4. In holding that the presumption from disputed possession, or any possession of a small amount of narcotics under the Harrison Act, *included the venue,* and was sufficient without proof, to sustain a conviction.

5. In holding that there was any credible or ample evidence to support the verdict on Count II.

6. In refusing to hold that the Harrison Act, is unconstitutional.

Your Petitioner presents and files herewith, Exhibit "A", a duly certified transcript of the entire record in the United States Circuit Court of Appeals, which is hereby made a part of this application, in compliance with Rule 35 of this court.

Your Petitioner also files as a part of this petition, a supporting brief, exemplifying the errors complained of.

Your Petitioner is advised and believes that this Honorable Court should require said case to be certified to it for review and determination in conformity with Section 240, Judicial Code.

WHEREFORE, Your Petitioner prays that a writ of certiorari issue under the seal of this court to said Ninth Circuit Court of Appeals, to review the judgment and decision aforesaid, that such decision, and the decision and judgment of the District Court, may be reversed, and your petitioner will ever pray.

THOMAS J. CASEY,
Petitioner.

JOHN T. CASEY,
Member of the Bar of the Supreme Court, Counsel for Petitioner.

United States of America,
State of Washington, } ss.
County of King.

Thomas J. Casey, being first duly sworn, deposes and says: I am the petitioner named in the foregoing petition for a writ of certiorari; I know the contents of said petition; the facts therein stated are true to the best of my knowledge, information and belief, and this proceeding is not prosecuted, nor is the writ of certiorari applied for, for the purpose of delay.

THOMAS J. CASEY.

Subscribed and sworn to before me this 27th day of August, A. D. 1927.

FRANK F. RANDOLPH,
Notary Public for the State of Washington, residing at Seattle.

United States of America,
State of Washington, } ss.
County of King.

I hereby certify that I am counsel for petitioner named in the foregoing petition and application for a writ of certiorari; that in my opinion the case is one in which the prayer of the petitioner should be granted by this court. That this application is not made for the purpose of delay.

JOHN T. CASEY.

Seattle, Washington, August 27, 1927.

In the Supreme Court of the United States

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Ninth Circuit Court of Appeals.

COUNT I DOES NOT CHARGE A CRIME

Count I of the indictment does not charge sufficient facts to show a violation of the Harrison Act. Briefly, it charges:

That on December 31, 1925, defendant unlawfully purchased at Seattle, 3.4 grains of morphine from an unknown person, not in or from the original stamped package.

Paragraph 12 of the Harrison Act as amended, provides:

"It shall be unlawful for *any person* to *purchase,* sell, dispense, or distribute any of the aforesaid drugs except in or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; . . . PROVIDED, That the provisions of this paragraph shall not apply *to any person* having in his or her possession *any of the aforesaid drugs* which have been obtained *from a registered dealer* in pursuance *of a prescription," etc.* (*Italics ours*).

Count I is not concerned with *registration,* but with a *purchase* only. While it charges the seller of the 3.4 grains is unknown, it fails to charge that *he was not*

registered, or that defendant did not purchase, *in pursuance of a prescription.* In either event the purchase would be lwful. To charge it was *unlawful,* is a mere conclusion. If the amount charged was a pound (5760 grains) we would hesitate to believe it was purchased on a legitimate prescription. Yet it might be true. But the insignificant amount (60 cents worth) (3.4 grains) could be lawfully purchased by any person at any time or place in the United States.

In the *Linder* case, 268 U. S. 5: 69 L. Ed. 809-13, this court said:

"Mere possession of the drug creates no presumption of guilt as against any other person." (Except those required to register).

In *Behrman v. U. S.,* 258 U. S. 280: 66 L. Ed. 619, this court held:

"An indictment for a statutory offense need only charge (but necessarily it *must* charge) facts sufficient to show that the accused *is not within any exception in such statute."*

In *U. S. v. Bathgate,* 246 U. S. 220: 62 L. Ed. 676, it was held:

"There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute."

See also *Johnson v. U. S.,* 294 Fed. (9CCA) 753. *Lewis v. U. S.,* 295 Fed. (9CCA) 678. *Hampton v. Wong Ging,* 299 Fed. (9CCA) 289. *Lamento v. U. S.,* 4 Fed. (2d) (8CCA) 901.

Count I does not charge a crime against the United States. It is insufficient for any purpose.

EVIDENCE ON COUNT I.

There was no evidence even offered in support of Count I. It is contended by respondent that the statutory presumption of guilt under the Harrison Act, is self-sufficient to convict without proof. That the evidence is sufficient to show that defendant *possessed* 3.4 grains of morphine, and therefore an *unlawful purchase in the District,* may be presumed. There was no *admitted possession. The possession* is presumed on a disputed *sale* of 3.4 grains. From this *presumed* possession an *unlawful purchase* is presumed. If a man can be found guilty solely on a presumption the Sixth Amendment to the Constitution is annulled.

The opinion of the Circuit Court holds that *the venue* is included in the presumption. That to hold otherwise, "would seem to rob the statute of all efficacy."

But later, when holding the record must show that this question was specifically pointed out in the trial court, it is then said: "Proof of venue is often *easily* supplied"—a patent inconsistency. If it is easily supplied, it could not possibly "rob the statute of *all efficacy,*" to require such proof. It was alleged defendant purchased 3.4 grains in the District. If there was no proof, the count should be taken from the jury on the Court's own motion. But if the *venue is presumed,* it is unnecessary to allege it in the indictment. If proof is unnecessary, the allegation is unnecessary —and would be immaterial if made. Hence it is not

necessary to try an accused person "by an impartial jury of the District *wherein the crime shall have been committed.*"—VI Amend. Constitution.

If the venue *is not included* in the presumption, the Government still has a decided advantage in being able to *presume* an *unlawful* purchase from *possession alone.* It does not "rob the statute of all efficacy," to refuse a construction that makes proof of the Government charge wholly unnecessary. If a citizen can be convicted solely on presumption, the Constitution is of little value to him. If a choice *must* be made between the Constitution and the Act. it is better to rob the statute of all efficacy than to rob the Constitution of its supremacy and the citizen of his fundamental rights. We cannot afford a construction that will make the Constitution useless and impotent to protect the citizen.

On this point a majority of the court (Judge Rudkin withholds assent) flatly conflicts with the Eighth Circuit in *Brightman v. U. S.,* 7 Fed. (2d) 532. *Cain v. U. S.,* 12 Fed. (2d) 580 and in *Hood v. U. S.,* 14 Fed. (2d) 925, where Judge Kenyon (who expressed some doubt in the Cain case, about the doctrine in the Brightman case) says: where the possession of the drug is denied [as in the instant case] the statutory presumption is wholly insufficient to convict.

It also conflicts with *De Moss v. U. S.,* 14 Fed. (2d) (7CCA) 1021, where it is said:

"Counsel for plaintiff in error contends that the government failed to prove the venue; that the pre-

sumption referred to in the Act. does not extend to the *place* of purchase. The precise question has been considered and very fully treated in *Brightman v. U. S.*, (CCA) 7 Fed. (2d) 532, and with the ultimate conclusion there reached we agree."

We submit then, that the decision of the Ninth Circuit Court of Appeals in the instant case, being: "in conflict with the decision of another circuit court of appeals on the same matter." Presents sufficient reason for granting a writ of certiorari.

See sub. Div. (b) Sec. 5, Rule 35, of this court.

COUNT II PATENTLY INSUFFICIENT

The second count makes a jumbled charge of nine different offenses against defendant. Some of them utterly inconsistent with others. It is misleading. And such numerous charges must tend not only to confuse the jury but prejudice them likewise. If defendant sold morphine he did not give it away. It would be just as sensible to convict an accused person of grand larceny on a charge of *stealing money,* without naming the person from whom he stole it or that such person was unknown, and without charging whether the amount stolen was ten cents or a thousand dollars, as to convict defendant on the second count in the instant case.

Some crimes may be charged in the language of the statute, but only where such statute clearly sets forth the elements of the offense. Even then sufficient particulars must be given so the accused may plead a

former conviction or acquittal in bar of a second prosecution for the same offense.

In *Miller v. U. S.*, 288 Fed. 816, an indictment almost identical with Count II in the instant case, was held fatally defective. It is there said:

"No person is alleged in these counts to whom it is charged that Miller sold, dispensed, or gave away, any morphine, nor is it alleged that it was sold to persons unknown. Nothing is charged to identify the sales, as between several on the same date."

In *Johnson v. U. S.*, 294 Fed. 753, Judge Rudkin illuminates this point. He says:

"Such an indictment gives no information whatever to the defendant as to the particular nature of the charge against him. He is required to register if he does any one of eight different things having little or no connection with each other. In other words, he cannot know whether he is charged with producing opium or dispensing cocaine. It would seem on general principles that such an indictment is fatally defective."

See also *U. S. v. Cook*, 17 Wall. 168-73: 21 L. Ed. 538-9. *Lynch v. U. S.*, 10 Fed. (2d) 947. *Anderson v. U. S.*, 294 Fed. 593. *Evans v. U. S.* 153 U. S. 587: 38 L. Ed. 830. *U. S. v. Standard Brewery*, 251 U. S. 210: 64 L. Ed. 229-35.

Count II does not inform defendant "of the nature and cause of the accusation," against him.

But neither does it charge any violation of the Harrison Act. Briefly stated it charges:

That on December 31, 1925, defendant unlawfully sold, etc., morphine at Seattle, without having registered and paid the special tax required by law.

It not only fails to charge how much, or to whom, defendant sold morphine, but it also fails to charge whether he sold from stamped or unstamped packages. The purport of Count II was to charge defendant with a violation of the Act for not, "having registered and paid the special tax as required by law."

Paragraph 8 of the Act points out who must register and pay the special tax—those who are dealing in STAMPED, not UNstamped drugs. A person dealing in UNstamped drugs is liable under paragraph 14 to have them seized and forfeited, but REGISTRATION is demanded from only those who deal in *stamped* articles. Others are not eligible to register. This is the express view in *Weaver v. U. S.*, 15 Fed. (2d) (6CCA) 38, where it is held:

"Count specifically charging sale of morphine, not *from* original *stamped* packages, without having registered with collector and paid special tax, *held* not to state offense under Harrison Act, as amended Feb. 24, 1919."

This view was also taken recently in the Eighth Circuit. In *O'Neill v. U. S.*, 19 Fed. (2d) 322, *published* July 16, 1927, *after* the instant case was decided. The opinion commends itself for sound reason, it is held:

"The possession by defendant of *un*stamped drugs *is not prima facie* evidence of violation of the first

penal provision of the Harrison Act, as amended," etc.

In the opinion it is said:

"It will be noted that the only provision for registry and payment of tax by dealers is limited to wholesale dealers who sell *in* the *original stamped package,* and retail dealers who sell *from* the *original stamped package.* . . . We think that it was the intent of Congress by these provisions of § 1 requiring registration and the payment of a special tax, to regulate and control the sale of drugs in or from stamped packages as distinguished from *un*stamped packages, and that the only persons required to register or *that are eligible to register under the Act,* are importers, etc., therein defined."

Here again, we have an irreconcilable conflict between two circuit courts. On one side, the Ninth Circuit in the instant case. On the other, the Sixth and Eighth Circuits—on the sufficiency of Count II—*for failing to register.* The Ninth Circuit has overlooked the plain language of the Act. But the conflict, again, comes squarely under Sub. Div. (b) Sec. 5, Rule 35, of this court. A writ of certiorari should be granted so as to clarify and not confuse the law and that the proper construction may be placed upon the Harrison Act for all alike. If an act is not a violation of the law in one circuit, it cannot be in another.

We expect the writ will issue to settle these conflicting decisions in the different circuits, and shall then point out the insufficiency and absurdity of the evidence in support of Count II. Also that a new trial

should have been granted for misconduct of the jury. We merely wish at this time to specifically but briefly urge the Constitutional question.

THE SO-CALLED HARRISON NARCOTIC ACT IS UNCONSTITUTIONAL AND VOID

This question was squarely raised in the Circuit Court briefs. When touching on that point in argument Judge Gilbert announced orally for the court, that they would not pass upon the Constitutionality of the Act. It will be conceded that Congress has no power to enact moral legislation for the purpose of suppressing the traffic in narcotic drugs. That is a matter exclusively within the reserved police power of the States. *United States v. Doremus,* 249 U. S. 86. *Linder v. U. S.,* 268 U. S. 5. The constitutionality of the Act has been directly passed upon but once (in the Doremus Case) and was left open later in the Daugherty decision, 269 U. S. 360: 70 L. Ed. 309, where this Court said:

"The constitutionality of the Anti-Narcotic Act touching which this court so sharply divided in *U. S. v. Doremus,* 249 U. S. 86, was not raised below and has not been again considered. The doctrine approved in *Hammer v. Dagenhart,* 247 U. S. 251; Child Labor Tax Case, 259 U. S. 20; *Hill v. Wallace,* 259 U. S. 44, 67; and *Linder v. United States,* 268 U. S. 5, may necessitate a review of that question if hereafter properly presented."

The earliest case is *U. S. v. Jin Fuey Moy,* 241 U. S. 394. The decision in that case turned solely upon

the question as to whether or not the mere possession of narcotics was a crime under the act. The court held that the possession of the drug alone by an unregistered person was not a crime unless the possessor of the drugs was a person required to register and pay the tax. The constitutionality of the law is not directly passed upon, but it is clearly stated by Justice Holmes that the court would not assume that Congress intended to make criminals out of the large and numerous body of persons within the United States who might have a small quantity of opium in their possession. The learned Justice, in his characteristic vein, very significantly refers to the argument of counsel for the Government that Congress cast the law in the form of a revenue measure "to give it a coating of constitutionality." The net result of the decision was to uphold the act as a revenue measure. It seems, however, that the maximum penalty provided in the act, [imprisonment for five years], is so grossly excessive and so flagrantly disportionate to the offense of failing to pay $3.00 annual tax that Congress could not possibly have intended the act as an excise measure only, but, on the contrary, intended to do what it had no constitutional power to do, namely: to enact police regulation for the benefit of the public morals and welfare, making the act a revenue measure in *form merely,* "to give it a *coating of constitutionality*"

If Congress did not exceed its power in the enactment of the Harrison law there is no limit to which it may not go in the punishment of those who seem to

transgress "the moral standard" set by Congress. It is only necessary to attach some phase of a revenue measure to inflict the most unusual punishment.

CONCLUSION

In conclusion we respectfully submit:

That the conviction of your petitioner on the first count cannot be upheld because it fails to charge a crime, and because of the failure to prove the venue, and that the Circuit Court of Appeals of the Ninth Circuit has rendered a decision in that behalf in direct conflict with the decisions of two other circuits.

That the conviction of petitioner cannot be upheld as to the second count because that count charges no crime and violates defendant's constitutional right to be "informed of the nature and cause of the accusation." That the decision is also in direct conflict with two other circuits.

That the conviction is void as to both counts because the law under which it was had is unconstitutional and void. This Honorable Court has stated that it would consider this constitutional question if properly raised. It has been properly raised. It is therefore, respectfully submitted that a writ of certiorari be granted as prayed for to the end that these important questions may receive from this highest of tribunals the consideration that they deserve.

Dated: Seattle, Washington, August 27, 1927.

JOHN T. CASEY,
Seattle, Washington. *Attorney for Petitioner.*

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CHARLES ELMORE CROPLEY
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JOHN T. CASEY,
Attorney for Petitioner.

Seattle, Washington.

THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

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PETITIONER'S SUPPLEMENTAL BRIEF.

We desire to Reply to some things in the Government's Main and Supplemental brief which were handed to us the day before the oral argument. Petitioner was prosecuted for an alleged violation of the Harrison Narcotic Act on an indictment containing two counts. 1. A purchase count. 2. A sale and tax count. The Government now concedes that Count II—the sale and tax count—is out of the case. At page 9 of the Government brief, the headline runs: "THE CONVICTION UNDER COUNT 2 CAN NOT BE SUSTAINED." *Of course we agree.* The reasons why, are stated in our petition and brief for the writ of certiorari.

COUNT I—PURCHASE.

Aside from other questions involved. it must be plain that the Government's admission, seriously impairs the validity, if it does not void, the conviction on Count I—the purchase count. All the Government's evidence that was introduced at the trial, went to support Count II. Only a very small part of it, *indirectly*, supported Count I. The

charge is a *purchase* of 3.4 grains of morphine. There was no direct evidence to sustain the charge as made. The whole purpose was to show *possession* of the 3.4 grains, so as to get the benefit of the statutory presumption of the Act which provides:

> "The absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession the same may be found."

If the Government was even confined to proving *possession* of the 3.4 grains, little of the evidence introduced to support Count II, would have been admissible if Count I was standing alone, as it is now conceded it should be. This fact alone should entitle defendant to a new trial on Count I.

Count I charges that on December 31, 1925, defendant *purchased* from an unknown person, 3.4 grains of morphine *in the District at Seattle*, and which was not in or from a stamped package. There was no evidence to support *any purchase*, at any time or place. If the "character assination" testimony was cut out of the record, there would be little or nothing *of concrete evidence of material fact* left to show *possession* of the 3.4 grains. If we allow ourselves to be carried away with *the abuse of defendant*, and jump to the conclusion that he could perform miracles in supplying narcotics to prisoners when he never had any, when the record fails to show that he ever made a single purchase; that in a thorough search of his person and office not even *a trace of narcotics* could be found (39), we may convince ourselves that the showing of *possession* is sufficient to consider the statutory presumption. We do not believe the evidence takes the case beyond speculation and conjecture on any point. This is not sufficient to support a verdict. See, Nor. Ry. Co. *vs.* Page, 274 U. S., 65.

In U. S. *vs.* Jin Fuey Moy, 241 U. S., 394, and in Linder *vs.* U. S., 268 U. S., 5, this court held that mere possession of narcotics was not a crime, and in the former that Congress *could not make it a crime* without invading the police power.

If the court adheres to those decisions in the instant case, the conviction under Count I, must be set aside.

A REVENUE MEASURE.

In the foregoing, and other cases, this court has further held that the Harrison Act can only be upheld as a revenue measure, *and within the limits of a revenue measure.* The Government is interested in collecting its revenues. It should not be interested in punishing real or imagined wrong doing within the states. In the instant case, defendant's promises to obtain morphine, if he ever made any, could not violate the Harrison Act. It might disregard the King County Jail rules, but the Government is not interested in that. It is conceded that defendant was not required to register and pay the occupational tax. The amount of tax on each ounce, or fractional part thereof, is one cent. If defendant, then, ever had possession of the 3.4 grains, the fractional part of an ounce, and the tax on it was not paid—he would owe the Government the munificent sum of one whole cent.

Is the Government so interested in the collection of its revenues that it will punish a citizen with 14 months at hard labor in the penitentiary for the failure to pay it one cent? If that was the intent of Congress in the enactment of the Harrison Law it either went back several centuries to a semi-barbarous age when men were hung, drawn, and quartered for trifling offenses, or else it merely put a Revenue Mask on the Police Power it used without right.

Let us illustrate what may be done under the law:

A citizen goes to a registered dealer with a prescription for an ounce of morphine. It is sold from a stamped package. The purchase is legitimate at the moment, but the purchaser goes home across a District or State line. A narcotic agent follows and arrests him. He searches his person and finds the morphine without a stamp on it. This is prima facie evidence that the Act was violated. Six months later he is tried. The seller is dead or gone to parts unknown, and the stamped package has long since been wholly used and sent to

garbage. The citizen has no record evidence and is convicted. He gets five years in the penitentiary and is disgraced forever. It appears like an abortion of justice. But it can be committed under the Harrison Act.

Is the punishment illustrated, or that inflicted in the instant case, only such incidental restraint as a taxing act should employ? Or is it aimed at punishment for a covert purpose? To ask the question is to answer it. We quote again from Child Labor Tax Cases, 259 U. S., 20:

> "In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?"

QUESTIONS PRESENTED.—VENUE.

At page 2 of the Government brief, it is said:

> "The *principal* question in this case is whether the provision in section 1 of the Harrison Act, to the effect that the absence of appropriate tax-paid stamps from the drugs shall be prima facie evidence of a violation of the section by the person in whose possession the same may have been found, should be construed not only to raise a presumption *of the fact of unlawful purchase*, but also that *the place of purchase* was in the District where the unstamped drugs are found in the possession of the accused."

At page 13 it is said:

> "The statute does not expressly state that possession shall be prima facie evidence that the unlawful purchase took place where the possession occurred."

At page 11 it is argued:

> "THE STATUTE SHOULD BE CONSTRUED TO MAKE POSSESSION OF UNSTAMPED DRUGS PRIMA FACIE EVIDENCE OF **THE PLACE** AS WELL AS **THE FACT** OF UNLAWFUL PURCHASE, AND SO CONSTRUED IT IS NOT INVALID."

We think such a construction would make it invalid. But, first, it would not be a legitimate construction of the Act as Congress passed it, but would be an amendment of it. By a few additional words Congress itself could have made *possession* of unstamped drugs, prima facie evidence of "the place" as well as "the fact" of purchase. Congress did not see fit to do that. The reason why, and the lessened evidentiary effect of the presumption, are both immaterial here. That was for Congress to decide. The presumption now in the Act is not doubtful in what it does say. Congress merely omitted a clause which the Solicitor General would like to have it contain, but he should appeal to Congress, not to this Court, for such a clause. If the Court will read into the Act the words Congress omitted—no doubt on purpose—then he will not have to appeal to Congress. A charge under the Act then, will practically mean conviction without the need of proof. The accused might be able to prove his innocence but he will have to do that. The charge will need little if any proof. A construction that adds something to the law, is not construction but legislation. He might as well ask the Court to declare that: "Congress didn't use all the words it intended to use in the Act. Congress didn't say all it meant to say about venue in the presumption. We will complete it under the guise of construction."

CONSTITUTION.—PURCHASE AND POSSESSION NOT THE SAME.

Second, the construction requested would impair the force and effect of the Sixth Amendment, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law."

To read something into the law is not permissible. It is equally obnoxious to give to the language used in the Act, *a*

strained construction, to make it cover a case that it was not plainly intended to cover. To include "the venue" in the presumption of the Harrison Act would also make it conflict with the plain and positive mandate of the Constitution. "Purchase" and "Possession" are not the same thing in the Harrison Act. *Purchase*, when not made from a stamped package, is made a crime. *Possession*, is only evidence of a crime—not the crime itself. It is prima facie—not conclusive—evidence, that a crime has been committed, that the Act has been violated. But it is always necessary under the Constitution to show where that crime was committed—*the purchase made*, where the Act was violated, the same as any other crime. If it can be presumed that *a purchase* was made in a District, merely because *possession* was had there, then the venue can change and be in any one of several districts. It would follow into the District to which the prima facie evidence was carried. It would be unnecessary to allege where the purchase was made, the law violated, the crime committed. The place of purchase and *the changeable place* of possession, would often, if not generally, be different. If the accused can be charged and tried in any District where the evidence against him is found, he could often be tried in more than one District—in the District where he *actually purchased the drugs*, and again where it *was presumed he purchased them*. The place of trial would be movable. Possession, rather than purchase, would give jurisdiction. The prima facie evidence—possession—might be found in any District. That is often different from where the purchase was made—the crime committed. Under the construction requested the accused could not rely on his Constitutional right of being tried in the "State and District wherein the crime shall have been committed." If the terms of the Act, or the construction sought to be placed on it, can fix the place of trial in disregard of the Constitution, "the venue" becomes a matter of discretion and minor concern. Such a construction would surely weaken, would impair, the Constitutional guaranty of a trial where the crime was com-

mitted. The terms of the Act would prevail over the Constitutional right. The Congressional Act would become superior to the Constitution. A paradox would result. The fundamental law would not be fundamental, but subject to the usurping power of its own legislative servant and creature. The Brightman case, 7 F. (2d), 532, DeMoss, 14 F. (2d), 1021, and other cases on this line are sound and should be approved.

NO VIOLATION OF ACT SHOWN IN RECORD.

At page 4 of the Government's Supplemental brief, it is said:

> "The charge is *purchase* of drugs on which the stamp tax had not been paid, and *possession of unstamped drugs* only enters into the case as the basis for the statutory presumption that the drugs were unstamped when purchased."

And at page 12 of the main brief, it is said:

> "*Proof of possession of unstamped drugs*, therefore, was sufficient to raise the presumption of the fact of unlawful purchase."

Where is the *proof of possession of unstamped drugs?*

It is not contended that defendant ever had a package of drugs—stamped or unstamped. Count I charges that he purchased 3.4 grains of morphine from *an unknown seller who had the unstamped package.* There was no proof that *the package* from which the 3.4 grains came, *was actually unstamped.* It is the Government's contention—not the defendant's—*that the 3.4 grains were unstamped*, and that this gave rise to the statutory presumption that *the package* from which it came, was also unstamped. We agree with Justice Holmes, that to require a penny stamp on the 3.4 grains, or on the towel or "other container" in which it was found, separate from the package from which it was taken, and then proof that the penny stamp was or was not there, does seem ludicrous. Yet that seems to be the plain terms of this peculiar Act. And it is now the solemn contention

of the Solicitor General, as quoted above from both Main and Supplemental briefs. They say in effect: It may appear absurd to require you to carry an appropriate stamp and use it when you get a grain of morphine, but unless you do this thing that appears absurd, you will go to the penitentiary. It is elementary then, that it was necessary for the prosecution to prove that there were no stamps on the alleged 3.4 grains. If they failed to make that proof, then they can not presume under the statute that the package from which the 3.4 grains came, was an unstamped package. This leaves Count I without the shadow of proof to sustain it, as the statutory presumption can not be used for any purpose until *the absence of the stamps* appears affirmatively established. An accused person might as well be convicted of murder without showing that any one was killed. It was imperative then for the prosecution to prove "*the absence of appropriate tax-paid stamps from*" the 3.4 grains. In oral argument the Solicitor General said: "Certainly there were no stamps on the laundry." How does he know that? His statement is only an oral assertion. There are many similar written assertions in the briefs. But such assertions are not proof of the fact. Where is the proof in the record? It is not there. We asked the Solicitor General to point it out in the proof. He failed to do so. Assertions are not facts or evidence of facts. Proper stamps were on the 3.4 grains or they were not. It was just as necessary to prove "*the absence* of appropriate tax-paid stamps" on the 3.4 grains, as to prove that defendant *possessed* the 3.4 grains. Neither fact can be presumed. *It is only after both facts are proven* that the statutory presumption can be availed of by the prosecution. One presumption can not be based on another presumption. See, C. M. St. P. Ry. *vs.* Coogan, 271 U. S., 472. The same ordinary rules of evidence should prevail in the instant case that universally prevail in every other case, civil and criminal.

Count I is wholly based on defendant's alleged failure to have an appropriate tax-paid stamp on the 3.4 grains, yet not a word of proof is in the record. We can only guess, or conjecture, that the stamps were absent. If any presump-

tion is indulged in, it must be that the law was complied with, not violated. Throughout the Government's briefs the arguments are based on defendant's "possession of unstamped drugs," and yet it never proved, or offered to prove, the absence of the stamps on which the argument is based. *It failed to prove that any of them were unstamped.*

Giving the prosecution the benefit of every possible inference that can be drawn, there was a complete failure of proof on Count I. There can be no dispute on that point. There was no proof of any kind or character to submit to the jury on Count I, even if possession of the 3.4 grains was openly admitted. If there were stamps on the 3.4 grains the Act was not violated in any way. And the absence of appropriate stamps must be shown. It was just as essential to prove *the absence of stamps*, as *the presence of morphine*, in the towels. Without the proof of both these essential facts, the jury had nothing to pass on.

CONCLUSION.

The Government has concluded that the conviction can not be sustained on Count II. It must be equally apparent that the conviction on Count I can not be sustained. The case was founded on a desire for revenge. It was supported by patently false testimony. The verdict of guilty was obtained by the partisanship of a juror, who appeared to have been "a plant" in the jury box. There never was a case in either law or fact. It is hard to understand how the case got this far. But it is here. The motion for a directed verdict on each count should have been sustained in the trial court. The judgment of the lower courts should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1927

Thomas J. Casey, Petitioner

v.

United States of America

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF ON THE MERITS

On November 21, 1927, this Court granted a Writ of Certiorari to review a judgment of the Ninth Circuit Court of Appeals, wherein Petitioner's conviction in the District Court under the Harrison Narcotic Act, was affirmed. The Clerk of this Court assured us the case would not be reached for argument until Spring, but recently the case was advanced for hearing on January 9, 1928. For that reason this brief is somewhat late and we must ask the indulgence of the Court to consider it.

The conviction was had on an indictment containing two counts. First, a *purchase* count, charging Petitioner with an unlawful purchase of 3.4 grains of morphine in the District at Seattle. Sec-

ond, a *registration and tax* count, charging that he sold morphine (no amount stated) without registering and paying the special tax. (R. 2, Petition pp. 2 and 10). No proof was offered to support Count 1. The prosecution relied wholly on the presumption of an unlawful purchase from the alleged possession of the 3.4 grains. The Circuit Court of Appeals (Judge Rudkin not concurring) sustained this position in direct conflict with the Seventh and Eighth Circuits on the failure to *prove venue.*

See, *Brightman v. U. S.*, 7 F. (2d) 532. *Ezzard v. U. S.* 7 F. (2d) 808, *Hood v. U. S.*, 14 F. (2d) 925, *Cain v. U. S.*, 12 F. (2d) 580, *DeMoss v. U. S.*, 14 F. (2d) 1021.

COUNT II OUT OF CASE

There is also a direct conflict between the Ninth Circuit in the instant case, and the Sixth and Eighth Circuits on the question of registration and payment of special tax, as charged in Count II. See, *Weaver v. U. S.*, 15 F. (2d) 38; *O'Neill v. U. S.*, 19 F. (2d) 322. The Government now concedes, however, that under the Harrison Act, and the evidence in this case, that Petitioner was not required to register or pay the special tax. At page 7 of the Government Brief, after reviewing the evidence, it is said:

> "The evidence thus failed to show that the Petitioner was a person required to pay a dealer's special tax."

And at page 9:

> "We have concluded that the conviction under Count 2 may not be sustained."

We may consider, then, that Count 2 is out of the case. For present purposes, this narrows the discussion to Count 1.

COUNT I.

We contend that Count 1 does not state facts sufficient to show a violation of the Harrison Act, when the Act is fairly construed. At pages 10 and 11 of our brief supporting the Petition, we pointed out that in Paragraph 12 of the Amended Act, certain purchases of narcotics are unlawful, unless made: "In or from the original stamped packages." And that in the same paragraph it is further provided:

> "That the provisions of this paragraph shall not apply to any person having in his or her possession *any of the aforesaid drugs which have been obtained from a registered dealer in pursuance of a prescription.*" etc. (Italics ours)

There is no allegation in Count 1, or in the indictment, to show that Petitioner failed to purchase the 3.4 grains of morphine "from a registered dealer in pursuance of a prescription."

That part of paragraph 12 which provides for lawful purchases of the drug, should have the same

force and effect as that part which makes other purchases *unlawful.* It is elementary that to make an indictment good, it must allege *sufficient facts* to show a violation of the law under which it is drawn. It is not sufficient to merely allege a conclusion *that the purchase was unlawful.* The facts alleged must bring the purchase under that part of the law which *makes it unlawful.* In the instant case, Count 1 does not do that. It does not allege that Petitioner purchased the 3.4 grains from an unregistered dealer, or that he did not have a prescription for it. It fails to take the purchase out of the PROVISO, or exception, *for lawful purchases.* It, as far as the facts alleged are concerned, may have been either lawful or unlawful.

> "An indictment for a statutory offense need only charge facts sufficient to show that the accused *is not within any exception* in such statute."
>
> *Behrman v. United States,* 258 U. S. 280: 66 L. Ed. 619.
>
> "The indictment must show that the accused is not within the exception."
>
> *Anderson v. U. S.,* 294 Fed. 593: *Lynch v. U. S.,* 10 Fed (2d) 947. 38 L. Ed. 830.
>
> See also, *Evans v. U. S.,* 153 U. S. 587: *U. S. v. Standard Brewery,* 251 U. S. 210. 64 L. Ed., 229-35.
>
> "There can be no constructive offenses, and before a man can be punished, his case must

be plainly and unmistakably within the statute."

U. S. v. Bathgate, 246 U. S. 220: 62 L. Ed. 676.

Count 1 fails to show, "plainly and unmistakably", that Petitioner violated the Harrison Act. If the Count is all true, his purchase of the 3.4 grains may have been perfectly lawful. If made "from a registered dealer in pursuance of a prescription," it was lawful and the Act was not violated.

NO EVIDENCE VENUE

No evidence was even offered in support of Count 1. There is nothing to enlarge the count. The prosecution claimed that Petitioner *had possession* of the 3.4 grains of morphine. That this was self-sufficient to convict under the statutory presumption which provides:

> "The absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this section by the person in whose possession same may be found."

It is contended that this statutory presumption of an unlawful purchase, from possession alone, extends also to the venue—the place of purchase. If possession of a large quantity of narcotics is admitted, or clearly established, it may be *prima facie evidence* of a violation of the Act—*an unlawful pur-*

chase. But the Act does not presume *where* the Act was violated, or *where* the unlawful purchase was made. If it were impossible for an accused person to purchase morphine in one District, and later have possession of it in another District, the inference of an unlawful purchase in the District where he was found in possession of it, might be legitimately drawn. But a purchase in one District and possession in another District, is not impossible, or even improbable. Such presumption would be radical. Inter-state and inter-district travel and communication is so constant and universal, that to make such a presumption would be well nigh irrational. To include *the venue* in the presumption of the Act is to conclude that *"purchase"* and *"possession"* is one and the same thing. That possession of any amount in any District means an *unlawful purchase* of it in the same District. We submit that such a conclusion is untenable in any criminal case. The conclusion reached by the Circuit Court of Appeals on this point in opposition to the Seventh and Eighth Circuits should be reversed.

> "There was no such connection between the fact of possession of morphine in one district and the fact of purchase of it in the same district as to make former prima facie evidence of latter, inasmuch as common experience does not support such presumption."

Brightman v. U. S. 7 Fed. (2d) 532.

"This is not a case of admitted possession of the drug from which inferences and presumptions under the statute might be drawn. Possession was denied." *Hood v. U. S.* 14 F. (2d) 925.

The venue is jurisdictional in every criminal case. It cannot be waived. *Wharton Crim.* Ev. Cec. 106a. *Vernon v. U. S.* 146 Fed. 121: *Moran v. U. S.* 264 Fed. 768: *Underwood v. U. S.* 267 Fed. 412: *Tuckerman v. U. S.* 291 Fed. 958-67.

This question is further discussed at pages 12 to 14 of our brief in support of the Petition for the Writ of Certiorari.

POSSESSION NO VIOLATION OF ACT

Since the Government now concedes, however, that Petitioner was not required to register, and Count II is out of the case, then it must also be conceded that mere possession of 3.4 grains of morphine, even if admitted by petitioner, would not constitute a violation of the Act, whether the venue is included or not. Possession of 3.4 grains of morphine by one not required to register, is not prima facie evidence of a violation of the Act. The presumption is made only against dealers who are required to register and pay the special tax. It being now conceded that defendant is not such a person, an unlawful purchase cannot be presumed against him even if he possessed the small amount of morphine charged in Count I. This Court has so held.

THE CASES

In *United States v. Jin Fuey Moy*, 241 U. S. 864: 60 L. Ed. 1061, it is held:

> "The words 'any person not registered' in §8 of the Opium Registration Act of 1914, do not mean any person in the United States, but refer to the class dealt with by the statute—those required to register—and one not in that class is not subject to the penalties prescribed by the statute."

It was properly argued in the briefs in that case, that:

> "Acts of Congress must be construed to avoid absurdities. The Harrison Drug Act *does not apply to mere consumers or possessors.*"
>
> "It is a revenue act, and in so far as it is, it does not violate the Constitution, but to construe said act as a police regulation to suppress the traffic in opium and other drugs, within the several States, would be to render it unconstitutional."

To escape an absurd conclusion concerning the Act, in the opinion this Court said:

> "Only words from which there is no escape could warrant the conclusion that Congress meant to strain its powers almost, if not quite, to the breaking point in order to make the probably very large proportion of citizens who have some preparation of opium in their possession criminal or at least *prima*

facie criminal and subject to the serious punishment made possible by §9."

Again in *Linder v. United States,* 268 U. S. 5: 45 S. C. R. 446: 69 L. Ed. 809, it is held:

> "The mere possession of morphine or cocaine creates no presumption of guilty violation of the Harrison Anti-Narcotic Law as against persons not required to register by section 1 of such act."

In the opinion it is said:

> "Further, grave constitutional doubts concerning section 8 cannot be avoided unless limited to persons who are required to register by section 1. *Mere possession of the drug creates no presumption of guilt as against any other person."* (Italics ours)

This has also been the uniform ruling in the lower Federal courts. See, *Johnson v. U. S.* 294 F. 753; *Lewis v. U. S.* 295 F. 678; *Hampton v. Wong Ging,* 299 F. 289, where it is said:

> "Whether or not the offense of which the appellees were convicted involved moral turpitude is not disclosed by the record. It informs us only that the appellees were each convicted of *having opium in his possession.* If this was the sum total of their offense against the laws of the United States, *they were innocent of violation of law."*

In *Lamento v. U. S.* 4 F. (2d) 901, it is held:

> "Possession by an addict or consumer, who is not a retailer or distributor, *in moderate*

> *quantities,* such as a consumer or addict might naturally have for his use, is not presumptive evidence of violation of section 8 or section 1."

It would seem unnecessary to say more. Defendant did not plead guilty to the charge of *purchasing* morphine. He denied that he ever *possessed* any. He was *presumed guilty of purchasing* because it was alleged that he *possessed* an insignificant amount. Yet possession of 3.4 grains by one who is not a dealer in stamped drugs, is no crime, and there can be no presumption of an *unlawful purchase,* either under the Act, or the adjudicated cases, even if possession was admitted.

It is admitted that the conviction under Count II cannot stand. Conviction under Count I is even more vulnerable, if that is possible. The Count does not charge, "plainly and unmistakably," any violation of the Harrison Act. There was no proof of a purchase to enlarge the charge or take it out of the *proviso* in paragraph 12. No conviction should stand without evidence to support the charge made. No indictment can prove itself. The judgment should be reversed.

NO POSSESSION

It would seem what has already been said calls for a reversal of the lower courts, yet, in the brief supporting our Petition for the Writ, (p. 17) we said:

> "We expect the writ will issue to settle these conflicting decisions in the different circuits, and shall then point out the insufficiency and absurdity of the evidence in support of Count II."

We did not then expect an admission by the Government that the conviction under Count II, should not be sustained. Yet it appears necessary to discuss the evidence in support of Count II, not now for the sake of Count II, but because of the indirect bearing it has on the alleged purchase of 3.4 grains in Count I. Defendant's possession is presumed because it is claimed he handed to the Nelson woman some laundry which was supposed to contain the 3.4 grains. From this claimed, or presumed, possession it is maintained that the statutory presumption of *an unlawful purchase*, may be drawn without other or further proof. With such view in mind, we deem it advisable to review the evidence, or lack of evidence, which bears indirectly on *possession.*

EVIDENCE

No matter how minutely the record may be scanned, little or no evidence can be found to identify the 3.4 grains of morphine. There can be no serious contention that any other amount was identified.

The prosecution claimed that on the morning of December 31, 1925, defendant made promises to ob-

tain morphine for two alleged addicts in the King County Jail. They testified as to what he said. It is not denied that a stenographic report was made and suppressed. They did not call Nelson, one of the alleged addicts. He was kept in jail until after the trial, and defendant was not permitted to either see him or call him as a witness. A felony charge for forging narcotic prescriptions was hanging over Cicero, the stool pigeon addict. (R. 33.) He was never tried, but at the time was under the complete domination of Narcotic Agent Patterson, who placed $20.00 to his credit to entrap defendant. (R. 57) He testified:

> "I was in jail on December 29th, and sent a message for Mr. Casey to come and see me. I knew at the time there was $20.00 deposited to my credit in the jail. Casey came December 31st. I told him I was sick, and asked him if he had anything for me. *He said he didn't have anything with him,* and explained *he did not want to change places with me.* I asked him to send me some morphine in a bath towel or laundry. *At the time I was not using narcotics.* (R. 30-1)

One, Hawkins, testified for plaintiff:

> "I was head trusty in the King County Jail. I didn't deliver packages to the prisoners without their going through the jailer's hands. He opened and examined the mail. It was against the rules to deliver any package to anybody, even an envelope, without

the jailer seeing it. It was against the rules for a lawyer or anyone else to deliver to the prisoners anything without the jailer's consent and knowledge. They have a large sign up in the jail publishing that fact, and if anyone did that, they would be forbidden the right to come to the jail. All I know about this is that on the 19th of December (not the 31st) a package came through for Wilson. I deliver the package after they have examined it. The jailer called me to his office and said, 'Take this to Wilson.' I did not see the party who delivered to the jail the package I took to Wilson." (R. 46-7)

Allen Stark testified for plaintiff:

"I was jailer at the King County Jail in December, 1925. Most of defendant's clients were narcotics. After he visited some of these prisoners, I had noticed that the same prisoners were under the influence of narcotics . . .

I have never searched any particular prisoner after Mr. Casey had visited them, but after he left *I suspicioned* he had given them narcotics. There would be other people visiting the jail about the same time, and there would be numerous packages coming up all day long. He was not the only lawyer who visited narcotic addicts. He has a very small percentage of the addict cases.

On December 19th, coming from Mr. Casey, I really do not know of anything personally." (R. 24-9)

Gerald V. Close testified for plaintiff:

> "That he was a Federal narcotic officer. . . . As to the conversation between Casey and Cicero and Nelson, it would not have been necessary to have the dictaphone to hear it . . . The conversation was in the normal tone of voice right straight along . . . When we searched Casey's office, we did not find any narcotics or any trace of them." (R. 34-8-9)

Albert D. Martin testified for defendant:

> "That he had been practicing law for 26 years, and had defended a great many prisoners. That he had often visited the King County Jail for many years. That attorneys were not allowed to come in personal contact with the prisoners except in the jail office. That it would be impossible to give any packages to the prisoners, as the screen separating the attorneys from prisoners is so fine that you could not put a match through it." (R. 64)

Defendant testified further: (See Petition, p. 5):

> "I heard George Cicero's testimony about Wilson and never made such a proposition at any time. I never sent, or caused to be sent, any narcotics to Wilson on the 19th of December, 1925, or at any other time . . . *I never represented Wilson.* Cicero gave me $25.00 as a part of a fee. His mother first came to me in the City Building at 5th and Yesler. I was going to see another client. Cicero had been taking orders for Christmas

> trees, and I helped the old lady to get the orders straightened out. She asked who I was and I handed her my card. Later Cicero sent for me." (R. 74-5)

The foregoing contains all the *material* testimony concerned with other narcotics than the alleged 3.4 grains, which we will advert to later. No other narcotics was mentioned by any witness. Stark's *suspicion* is not testimony. He had a reason for his suspicion. He was let out shortly after the trial in this case. It became public that he insisted on attorneys who did business at the jail, paying him a part of their fees. Defendant refused to do that. Hence, Stark readily became a partisan against him. Defendant could not deny what Stark *claimed* to be *his suspicions.* They were not the statement of facts, even if honest. But they were not honest. He could arbitrarily stop defendant from visiting the jail, and would have done so if he had actually entertained such suspicions. There is not a single kernel of fact in all this chaff of insinuations, innuendoes, and suspicions, identifying other narcotics than the 3.4 grains. No court can dignify what was said as the statement of a fact, showing that defendant deprived the Government of any of its revenue. There is no justification for asserting that there was "ample proof of sale not from or in a stamped package."

THE 3.4 GRAINS

The Government's testimony tending to show that defendant possessed the alleged 3.4 grains of morphine is contradictory. The theory was that defendant ironed this small amount into a towel preparatory to bringing it to Roy Nelson in the jail, and that Mrs. Nelson happened into his office at just the right time to take it to the jail for him. It is possibly true that there was some morphine in the laundry. There was a purpose in claiming it was there. Yet, the testimony on that point is also very unsatisfactory.

Close testified that Exhibit 11 was a bath towel which he and Patterson turned over to the City Chemist to be analyzed. That "14" was the morphine extracted from the towel by the City Chemist. (R. 37-8). Hofflan and Ballaine claim that they, not the City Chemist, made the test. Not a quantitative, just a qualitative. That "12" was a bottle containing the aqua solution—morphine sulphate. (R. 50-2). The City Chemist, Jacobson, did not test the towel—"11" at all. He extracted nothing from it. He merely analyzed the contents of "12", which was given to him, and found 3.4 grains of morphine hydrochloride in the bottle, not in the towel. He contradicts the others. He says Patterson turned 14 and 15 over to him, not "11". (R. 58).

All the witnesses, except Patterson, admit they knew nothing of where the laundry came from, only what Mrs. Nelson told them. It also appears certain that Mrs. Nelson brought the laundry to defendant's office. The immutable written evidence, *in green ink,* used in the narcotic office—"F. B. Nelson 1:45, December 31, 1925", is signed on the Government's own Exhibit 10. She signed her name on it with the time she received it from Patterson. She said she *first* went to defendants' office 45 minutes later—at 2:30, and could not get in. Why was she so persistent in going back 20 minutes later? (R. 44). Because she was carrying out the orders which had been given her to entrap Casey into bringing that package to the jail and get caught in the act. When he refused, what did she do? She answered that question: *"I took it BACK up to the narcotic office."* (R. 43). She would not have made this slip of the tongue, and said she took it BACK, if she was not conscious of getting it there at 1:45. She could not wholly avoid telling the truth though they had five months between the arrest and the trial to fix up the details of this story.

But what kind of a character was this woman? It is often insignificant things that confound the perjurer. She said she was married to Fred Nelson four years; was never married before; and had never lived in Ballard. The public records

show she was married twice before, (R. 88), that she had sued her second husband for a divorce, which had not yet been tried, and was then living with Nelson in adultery. (R. 43, 48.) That she had lived four places in Ballard where she was engaged in bootlegging. (R. 86).

It was solely on the testimony of this woman that the Government relied to show that defendant *possessed* the 3.4 grains of morphine. The defendant with two witnesses, the mothers of several children, testified to the contrary. But more than that—Exhibit 10, in her hand writing and signature—gave her the lie. The Government should be bound by its own exhibit. Mrs. Knight testified:

> "I have seen Mrs. Nelson here in the court room. I have an office with Mr. Casey. I went there about 2:00 P. M. on December 31, 1925. Mrs. Traynor was waiting to see me. While we were there, a large, fleshy lady came to see Mr. Casey. She went directly into his office. She had a package in her hand. Exhibit 10 looks like the color of it. She said, 'I am Roy's sister-in-law, Mrs. Fred Nelson. I have a package here I would like to have you take up to the jail for Roy. : : Roy is in terrible shape.' Mr. Casey said, 'If he is in that bad shape get a doctor and he will relieve his condition.' She went out with the same package still in her possession." (R. 68-70) Mrs.

Traynor corroborated this testimony. (R. 71-2).

It may be argued that the jury passed upon the evidence, and that this court will not go into the facts. Yet, when necessary, this Court does pass upon the facts. It is necessary in this case, because, aside from all other questions, this High Court must now say, once and for all, whether or not the evidence in this case shows that defendant *purchased,* or had such possession of morphine that it may be safely assumed that he did purchase, 3.4 grains of morphine in the Seattle District contrary to law, and not within the Proviso exception.

> "Even in the absence of a motion to instruct the jury to find for the defendant this court may examine the question where it is plain that error has been committed."
>
> *Clyatt v. U. S.* 197, *U. S.* 207.

> "Where a plain error has been committed in a matter vital to defendants, this court is at liberty to correct it, although the question may not be properly raised; and, . although no exception was taken."
>
> *Wiborg v. U. S.* 163, *U. S.* 633.

JUROR—WITNESS

This Court also examines the facts when they are insufficient in law, or it is self-evident that an accused person has not had a fair trial. Eight of

the jurors voted on the first ballot for defendant's acquittal in spite of the fact that they were turned loose every night for a week and surrounded by a swarm of narcotic agents. Five of the jurors made affidavits that one of their number told the others that he knew defendant's handwriting from private sources and that they could take his word for it that defendant wrote the disputed words "Roy Nelson, King Couinty Jail" on Exhibit 10, as Mrs. Nelson had testified, and contrary to what defendant testified. (R. 86-9)

In *Deery v. Cray*, 72 *U. S.* 5 *Wall.* 795: 18 L. *Ed.* 653, this Court said:

> "We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. But whenever the application of this rule is sought, *it must appear so clear as to be beyond doubt* that the error *did not and could not* have prejudiced the party's rights."

It was misconduct of the juror. He had no right to convince either himself or the other jurors from private sources, and information not known to the others. The Circuit Court of Appeals said this could not have *greatly* influenced the jury. But if they were influenced at all, a new trial should have been granted. When a verdict is tainted it should be set aside on the court's own motion. The jurors

swore that they were influenced. That should be sufficient. Theretofore eight of them were for acquittal. Thereafter defendant was convicted without being confronted face to face with the juror-witness. It was not discretionary, the verdict should have been set aside.

See, *Mattox v. U. S.* 146 *U. S.* 140: 36 *L. Ed.* 917 *State v. Lorenzy,* 59 *Wash.* 308: 109 *Pac.* 1046. *State v. McChesney,* 114 *Wash.* 113: 194 *Pac.* 551.

CASE ABSURD

The term "frame-up", may be threadbare, but this case has every ear mark of being nothing else. It has not been denied that the Nelson woman said: "she would kill Casey." (R. 85), and that this case was a frame-up. (R. 87.) Patterson said: "Casey double-crossed me and I will get him for it." (R. 61.) One dose of morphine for an addict is from 6 to 40 grains. (R. 83.) The average does is 15 grains.

> "Morphine users consume an average of 15 grains daily. Cases are known where 45 to 70 grains have been injected daily."
>
> War on Opium by Anti-Opium Association.

No man, unless a complete idiot, would involve his liberty by trying to smuggle through a strange woman, 3.4 grains to an addict in jail. It would aggravate and anger the addict rather than satisfy him. His craving for the drug would become more

acute. Then again, if defendant actually meant to send or bring morphine to the addicts in jail on December 31, 1925, why was the Nelson woman sent to assist him? It was because they knew he was not going to do so, that they sent the Nelson woman to entice him into it. If she was smart enough to "bootleg" for years and not get caught, she might be smart enough to bait defendant into that trap. When she failed, then the story had to be changed. Standing alone without contradiction the woman's testimony is incredible. The evidence of defendant with his two witnesses, and Government Exhibit 10, which supports them, should be accepted. There is no credible testimony to show that defendant ever possessed the 3.4 grains of morphine. The statutory presumption of an unlawful purchase cannot be legitimately drawn, because there is no believable proof of possession.

> "Such a mode of arriving at a conclusion of law is generally, if not universally, inadmissable. No inference of fact or of law is reliably drawn from premises which are uncertain."
>
> *U. S. v. Ross,* 92 U. S. 281-3: 23 *L. Ed.* 707.
>
> "Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed."
>
> *C. M. & St. P. Ry. v. Coogan,* 271 *U. S.* 472: 70 *L. Ed.* 1041.

In the instant case, there is no legitimate or believable evidence of possession, upon which to presume a purchase, either lawful or unlawful. It is the God's truth that defendant never possessed a single grain of morphine in his life.

HARRISON ACT UNCONSTITUTIONAL

At page 18 of the brief supporting our Petition for the Writ, we briefly argued that the Harrison Act is unconstitutional. We desire at this time to enlarge some on that point. We realize that this Court naturally hesitates to declare invalid, any law passed by Congress. It was well expressed as "a painful duty", by the great Marshall. But the powers of Congress are wisely limited. It was never intended that the National Government should usurp the ordinary Police powers reserved to the States. The suppression of crime is one of the State's powers, Section 4071-3 Laws of 1923 of the State of Washington provide severe penaltics for traffic in narcotics. Unless carefully guarded and regulated, moral standards may easily be violated in the purchase or sale of narcotics. While Congress has the right to raise revenue by a tax on the commercial movement of narcotics, the same as on tobacco and many other things, it has no right to punish a citizen because he violated the moral law in his use of narcotics. That belongs to the Police Power of the States. If the object of the Harrison Act is to raise revenue, and inci-

dentally impose normal penalties for the non-payment of the taxes imposed, it is constitutional. If, however, the covert object is to inflict punishment for the immoral traffic in drugs, and only incidentally collect a tax, then the Act is unconstitutional, and this Court should no longer hesitate to so declare. In the *Linder case,* 268 *U. S.* 5: 69 *L. Ed.* 809, in a comprehensive opinion, it is made plain that Congress cannot make it a crime to sell or distribute narcotics no matter how immoral or detrimental to the public welfare such traffic may be. It has a right to levy a tax for obtaining revenue, but it may do no more. If Congress passed the law, not for the purpose of raising revenue—even though it may yield considerable—but to regulate or prohibit the sale of narcotics by imposing severe penalties, then the Act is unconstitutional.

We submit that the chief object of the Harrison Act was not to pass a revenue measure. It was conceded by the Government in the *Jin Fuey Moy* case, 241 *U. S.* 394, that it was passed for the purpose of carrying out the recommendations of the International Opium Convention. Hence the chief object of Congress was, *not to raise revenue,* but *to stamp out what was regarded as a nefarious traffic.* But however laudable the purpose, Congress has no right under our dual system of government, to prohibit the purchase or sale of drugs. Prior to the Eighteenth Amendment, it had no

power to regulate the sale of liquor except on reservations or on other Governmental territory. It might raise revenue on liquor as it did, but it had no right to prohibit the traffic. The constitutionality of the Harrison Act is not directly passed on in the Jin Fuey Moy case. In the *Doremus* case, 249 *U. S.* 86, the Act is upheld by a divided court, but on the sole ground of being a revenue measure. The majority opinion loses sight of the fundamenatol rule so ably pronounced in later cases by the present Chief Justice, that the Court will look to the *purpose* and *intent* of Congress in the enactment of a law, and determine whether its *primary* purpose was to impose a tax, with incidental restraint on the business of occupation, or whether its *real* purpose was to regulate or prohibit something beyond the power of Congress to control. It seems unnecessary to go farther than to quote the learned Chief Justice in the famous *Child Labor Tax* Case, 259 *U. S.* 20: 66 *L. Ed.* 817:

> "We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does the law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? or does it regulate by the use of the so-called tax as a penalty?"

After pointing out that the law provided heavy burdens and penalties for its violation—as the Harrison Act does—and that a court "must be blind not to see that the so-called tax is imposed to stop employment within the age limits prescribed", then adds:

> "It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress dealing with subjects not entrusted to Congress but left or committed by the Supreme Law of the land to the control of the States. We cannot avoid the duty, even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the Ark of our Covenant, or the harm which will come from breaking down recognized standards."

The logic of this great opinion must be departed from, to uphold the Harrison Act as constitutional. While one Justice dissented, the opinion could not be answered, and the Justice wisely refrained from trying.

In *U. S. v. Daugherty*, 269 *U. S.* 360: 70 *L. Ed.* 309, (Our brief p. 18), Justice McReynolds cites this case, with *Hammer v. Dagenhart*, 247 *U. S.*

251. *Hill v. Wallace,* 259 *U. S.* 44, 67, and the *Linder* case, supra., and concludes that if the constitutionality of the Act is hereafter properly presented, may necessitate a review of the question. The question is now presented, and the principles enunciated in the Child Labor Tax Case should become the settled law of the Country regarding the Harrison Act. The soundness, lucidity, and logic of that opinion cannot be disregarded when the validity of any Congressional act is in question.

It is inconceivable that if Congress had intended the Harrison Act merely as a revenue measure, that it would have made the failure to pay $3.00 tax, a felony punishable by five years in the penitentiary, or the failure to pay *one cent* special tax on 3.4 grains of morphine, punishable by 14 months in the penitentiary, with disgrace and disfranchisement. As Judge Bourquin, an excellent constitutional lawyer, recently announced in a prosecution under the Harrison Act:

"If all persons who owed some tax under it should be imprisoned in the penitentiary, there would not be enough outside to act as keepers."

If by any view than can be imagined, defendant unlawfully purchased 3.4 grains of morphine, on which he failed to pay *one cent* special tax, is fourteen months in the penitentiary, only such: *"Incidental restraint* and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty?"

There is only one sensible answer to this question. Congress exceeded its powers, and invaded the Police Power of the States, in the enactment of the Harrison Act the same as it did in the Child Labor Act. It should be likewise held unconstitutional.

Whether the law is condemned or not however, under a fair construction of the Act, no violation of it is alleged in the indictment, and none was proven at the trial. The judgments of the lower courts should be reversed and the action dismissed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 500

THOMAS J. CASEY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals may be found at page 107 of the record. It has not yet been reported.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was entered on June 27, 1927. (R. 114.) A petition for rehearing was filed and entertained, but denied on August 1, 1927. (R. 115.) The present petition was filed in this Court on September 1, 1927.

The jurisdiction of this Court to issue the writ prayed for is conferred by the Act of February 13, 1925.

THE QUESTIONS PRESENTED

Petitioner contends (1) that the statutory presumption of unlawful purchase of narcotics arising from the possession of unstamped drugs does not relieve the prosecution from establishing the venue of the purchase, and (2) that Count 2 of the indictment is fatally defective and the conviction thereunder not sustained because the indictment failed to charge and the proof failed to show that the petitioner was dealing in stamped drugs, it being his contention that a dealer in unstamped drugs is not required to register as a dealer and pay the special tax.

STATEMENT

The petitioner was convicted in the United States District Court for the Western District of Washington under an indictment in two counts. (R. 4.) He was sentenced to serve 14 months on each count, the sentences to run concurrently (R. 10), so that if conviction under either count is free from reversible error the judgment below must stand. Under Count 1 (R. 2) petitioner was charged with having purchased morphine not in or from an original stamped package. By Count 2 the charge was that he "did * * * manufacture, produce, compound, sell, deal in, dispense, distribute, administer, and give away * * * morphine, without having registered and paid the special tax as required and imposed by law." There was no allegation in Count 2 that petitioner dealt in or dis-

pensed *stamped* drugs. The evidence tended to establish that the petitioner, a lawyer, visited prisoners in the King County Jail and received from them money with which he ultimately supplied them clandestinely with narcotic drugs. Thus there was ample proof of sale not from or in a stamped package, but Count 1 charged purchase, not sale. There was no proof of purchase, except proof of possession of unstamped drugs. To convict under Count 1 the United States was therefore obliged to rely on the presumption created by the statute that possession of unstamped drugs is *prima facie* evidence of unlawful purchase.

Under Count 2 there was no proof of importation, manufacture, or compounding drugs. The only evidence of dealing in drugs was that above mentioned, showing sales of drugs not in or from the original stamped package. Such proof of dealing in drugs as was produced showed dealing in unstamped drugs. No attack on the indictment was made until after verdict, when the insufficiency of the indictment was asserted in a motion in arrest of judgment. (R. 4.) The bill of exceptions shows that at the close of the evidence (R. 83) the "defendant challenged the sufficiency of the evidence and requested the court to instruct the jury to return a verdict of Not Guilty on Count 1 of the indictment." A similar request was made as to Count 2 (R. 84).

The assignments of error in the Circuit Court of Appeals (R. 13) include the refusal of the trial

court to direct the jury to find the defendant not guilty and its denial of the defendant's motion in arrest of judgment (R. 16).

PERTINENT STATUTES

Section 1 of the Harrison Narcotic Act of December 17, 1914 (c. 1, 38 Stat. 785), as amended by the Act of February 24, 1919 (c. 18, 40 Stat. 1057, 1130), U. S. C. Title 26, Section 211, provides, among things:

> That on or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business and place or places where such business is to be carried on, and pay the special taxes hereinafter provided * * *.

It then provides a tax of $24 per annum on importers, manufacturers, producers, or compounders; $12 per annum on wholesale dealers; $6 per annum on retail dealers; and $3 per annum on physicians and other practitioners entitled to administer drugs in the course of professional practice.

It then defines importers, manufacturers, and dealers as follows:

> Every person who imports, manufactures, compounds, or otherwise produces for sale or distribution any of the aforesaid drugs

shall be deemed to be an importer, manufacturer, or producer.

Every person who sells or offers for sale any of said drugs in the original stamped packages, as hereinafter provided, shall be deemed a wholesale dealer.

Every person who sells or dispenses from original stamped packages, as hereinafter provided, shall be deemed a retail dealer * * *.

The section then provides:

It shall be unlawful for any person required to register under the provisions of this Act to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this section.

There is then found in Section 1 the following provision:

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required

by this section shall be prima facie evidence of liability to such special tax * * *.

ARGUMENT

It will be noted that while the law requires every person who imports or compounds drugs to register and pay the importer's or manufacturer's special tax, the only dealers who are required by the Act to register and pay the special tax are those who sell or offer for sale any of the drugs in the original stamped package.

Count 2 of the indictment did not allege that the drugs which the petitioner was charged with having manufactured, sold, and dealt in were in or from the original stamped packages. In so far as it charged manufacture or production, the indictment was good, because, for obvious reasons, the law does not require that a manufacturer or importer must manufacture or import *stamped* drugs to become liable to the special occupation tax. In so far as Count 2 of the indictment charged sale and dealing in drugs, it may have been insufficient as against a timely attack, because it did not allege that the drugs dealt in were in or from the original stamped packages, and Count 2 charged only the failure to pay the special occupation tax, which is only required from dealers who deal in drugs in or from the original stamped package. While Count 2 of the indictment was probably good as against an attack first made by motion in arrest of judgment, we find the evidence failed to show any

manufacturing or importing and showed only dealing in drugs from or in unstamped packages. The evidence thus failed to show that the petitioner was a person required to pay a dealer's special tax.

The Circuit Courts of Appeals of the Sixth and Eighth Circuits have held that one dealing in drugs not from the original stamped packages is not required by the Act to pay the special tax. *Weaver* v. *United States,* 15 F. (2d) 38; *O'Neill* v. *United States,* 19 F. (2d) 322. We see no reason to doubt the soundness of these decisions. The terms of the statute are explicit in saying that dealers in or from the original stamped packages are those who must pay the special occupation tax.

The Circuit Court of Appeals in the case at bar does not discuss this problem, but disposes of the second count by the following statement (R. 110):

> Upon the second count the evidence, though conflicting, is ample to support the verdict.

We do not feel justified, therefore, in resisting the petition for certiorari on the ground that the conviction under Count 2 of the indictment was proper. It remains to consider whether that under Count 1 may be sustained.

The single point under Count 1 is whether the proof showed the offense to have been committed within the district. The charge was purchase of drugs not in or from stamped packages. The proof showed sales not in or from stamped packages, and therefore showed possession. To sustain the charge of purchase the United States was obliged to rely

on the presumption created by that provision of the statute to the effect that—

> the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found.

Proof of possession of unstamped drugs, therefore, was sufficient to raise the presumption of purchase, but the question is whether the presumption is not only as to the fact of purchase, but as to the place of purchase so as to support the venue.

The Circuit Court of Appeals for the Eighth Circuit, in *Brightman* v. *United States,* 7 F. (2d) 532, and in *Cain* v. *United States,* 12 F. (2d) 580, and the Circuit Court of Appeals for the Seventh Circuit in *DeMoss* v. *United States,* 14 F. (2d) 1021, have held that the presumption arising from the possession of untax-paid narcotic drugs does not extend to the place of purchase.

In the present case the Circuit Court of Appeals for the Ninth Circuit has held the other way. It said (R. 110):

> While defendant's contention is not without support in the decided cases * * *, to grant it would seem to rob the statute of all efficacy. If independently of the statutory presumption, the Government must affirmatively prove the place of purchase, it must also by like evidence prove the substantive fact of purchase, for how the place of purchase can be established without at

> the same time proving the purchase, is not apparent. Fairly construed, the statute in our opinion extends the presumption to the incidental matter of place as well as the substantive matter of purchase.

While the court has advanced persuasive reasons in support of its conclusion on this point, since it is in direct conflict with the decisions of Circuit Courts of Appeals in two other circuits it is a proper case for the issuance of the writ of certiorari to settle the conflict.

We are not disposed to press any contention that the questions involved were not sufficiently raised below.

Since we have concluded that the conviction under Count 2 may not be sustained and that in respect of the conviction under Count 1 a question is raised on which there is a conflict of decisions, we see no ground for opposing the issuance of the writ.

Respectfully submitted.

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SEPTEMBER, 1927.

U. S. GOVERNMENT PRINTING OFFICE: 1927

In the Supreme Court of the United States

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

The petitioner's brief, filed January 5, 1928, was served after the brief for the United States had been sent to the printer, and it raises points not dealt with in the brief for the United States.

I. The petitioner contends that Count 1 of the indictment doeos not charge an offense because, although it charges petitioner with unlawfully purchasing morphine not in or from a stamped package it fails to allege that the drug had not been obtained in pursuance of a bona fide medical prescription, and therefore fails to negative the exception contained in a proviso in Section 1.

The sufficiency of Count 1 was not questioned until after verdict, by motion in arrest (R. 4), and

the record does not disclose that this ground for attack on Count 1 was mentioned in the motion or even mentioned in the District Court. The opinion of the Circuit Court of Appeals does not mention the point. It states (R. 108):

> The sufficiency of the first count is not seriously challenged. One of the clauses is grammatically misplaced, but the meaning is so obvious that to quash upon that ground would be a pure legalism.

The briefs in the Circuit Court of Appeals show that there the attack on the sufficiency of Count 1 was because of the misplacing of a clause, mentioned in the opinion below. That point was that the clause "not in the original stamped package," etc., was so placed as to mean that the accused was not in a stamped package.

The point that Count 1 should have alleged that the drug was not purchased in pursuance of a prescription was first mentioned on the application for certiorari.

The evidence was ample to show that the drugs which the petitioner was selling and delivering to prisoners in the jail had not been obtained by him on a bona fide medical prescription.

The point is without merit. Section 8 refers to offenses under Section 1 of the Act and to the exception of the case of drugs obtained on medical prescription and then provides:

> That it shall not be necessary to negative any of the aforesaid exemptions in any com-

plaint, information, indictment, or other writ or proceeding laid or brought under this Act; and the burden of proof of any such exemption shall be upon the defendant.

See *Watson* v. *United States,* 16 F. (2d) 52, 54; *Nelson* v. *United States,* 298 Fed. 93, 94; *Newman* v. *United States,* 299 Fed. 128.

II. The petitioner also contends that the conviction under Count 1 of the offense of purchasing morphine not in or from a stamped package should not be sustained because it rests on proof of possession and that the statute does not make possession by one not a registered dealer prima facie evidence of unlawful purchase of unstamped drugs.

The provision in Section 1, as amended, that "the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found" does not limit the presumption to the cases of those who are registered dealers.

So far as offenses against the stamp tax provisions are concerned, it makes no difference whether the offender is or is not registered. *United States* v. *Wong Sing,* 260 U. S. 18. *United States* v. *Jin Fuey Moy,* 241 U. S. 394, cited by petitioner, arose under the original Act before the stamp tax provisions were added, and it dealt with the substantive offense of possession without registration defined in Section 8. In *United States* v. *Wong Sing, supra,* the Court pointed out the distinction between the

Jin Fuey Moy case and a case involving unstamped drugs.

Count 1 does not charge the offense of possession, and the petitioner was not convicted of unlawful possession. The charge is purchase of drugs on which the stamp tax had not been paid, and possession of unstamped drugs only enters into the case as the basis for the statutory presumption that the drugs were unstamped when purchased. The case of *Linder* v. *United States,* 268 U. S. 5, arose under the order form provisions of Section 2 and does not deal with the stamp tax provisions.

III. The stamp tax provisions of Section 1, on which Count 1 was based, were sustained in *Alston* v. *United States,* 274 U. S. 289.

Respectfully submitted.

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JANUARY, 1928.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 500

THOMAS J. CASEY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 107) is reported in 20 F. (2d) 752.

JURISDICTION

The opinion of the Circuit Court of Appeals to be reviewed was entered June 27, 1927. (R. 114.) The petition for certiorari was filed September 1, 1927, and granted November 21, 1927 (R. 119), pursuant to Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED

The principal question in this case is whether the provision in Section 1 of the Harrison Narcotic Act, to the effect that the absence of appropriate tax-paid stamps from the drugs shall be prima facie evidence of a violation of the section by the person in whose possession the same may have been found, should be construed not only to raise a presumption of the fact of unlawful purchase, but also that the place of purchase was in the district where the unstamped drugs are found in the possession of the accused.

THE STATUTE

Section 1 of the Harrison Narcotic Act of December 17, 1914 (c. 1, 38 Stat. 785), as amended by the Act of February 24, 1919 (c. 18, 40 Stat. 1057, 1130), U. S. C. Title 26, Section 211, provides, among things:

> That on or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business and place or places where such business is to be carried on, and pay the special taxes hereinafter provided * * *.

It then provides a tax of $24 per annum on importers, manufacturers, producers, or compound-

ers; $12 per annum on wholesale dealers; $6 per annum on retail dealers; and $3 per annum on physicians and other practitioners entitled to administer drugs in the course of professional practice.

It then defines importers, manufacturers, and dealers as follows:

> Every person who imports, manufactures, compounds, or otherwise produces for sale or distribution any of the aforesaid drugs shall be deemed to be an importer, manufacturer, or producer.
>
> Every person who sells or offers for sale any of said drugs in the original stamped packages, as hereinafter provided, shall be deemed a wholesale dealer.
>
> Every person who sells or dispenses from original stamped packages, as hereinafter provided, shall be deemed a retail dealer * * *.

The section then provides:

> It shall be unlawful for any person required to register under the provisions of this Act to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this section.

There is then found in Section 1 the following provision:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the

aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by this section shall be prima facie evidence of liability to such special tax * * *.

STATEMENT

The petitioner was convicted in the United States District Court for the Western District of Washington under an indictment in two counts. (R. 4.) He was sentenced to serve 14 months on each count, the sentences to run concurrently (R. 10), so that if conviction on either count is free from reversible error the judgment must stand. On writ of error the Circuit Court of Appeals sustained the conviction on both counts.

Under count 1 (R. 2) the petitioner was charged with having *purchased* morphine not in or from an original stamped package.

In count 2 the charge was that he "did * * * manufacture, produce, compound, sell, deal in, dispense, distribute, administer, and give away * * * morphine, without having registered and paid the special tax as required and imposed by law."

There was no allegation in count 2 that the petitioner dealt in or dispensed *stamped* drugs.

The evidence tended to establish that the petitioner, a lawyer, residing in King County, in the State of Washington, visited prisoners in the King County Jail, and delivered to them clandestinely narcotic drugs for which they paid him, and that the drugs were sometimes delivered through the medium of handerkerchiefs or cloths which had been saturated with the fluid containing the drug and which the prisoners would soak in water in order to withdraw the drug.

There was ample proof of sale not from or in a stamped package, but count 1 charged purchase, not sale. There was no proof of purchase, except proof of possession of unstamped drugs. The evidence was sufficient to show that petitioner had possession of drugs during the course of the sale and delivery to the prisoners, and the manner of delivery sufficiently established that drugs in the petitioner's possession in King County, were not in stamped packages.

To convict under Count 1 the United States was therefore obliged to rely on the presumption created by the statute that possession of unstamped drugs is prima facie evidence of purchase of unstamped drugs.

On the question of the *place* of unlawful purchase, there was no direct evidence to cover the question of venue and show that the unlawful purchase had been made within the district. The pe-

titioner resided and practiced law in the district and conducted the operations in drugs disclosed by the evidence within the district, and there was nothing to suggest that he had, during the period of these transactions, been outside of the district within which the offense was alleged to have been committed, but unless the provision of the statute that possession of unstamped drugs is prima facie evidence of violation of the section is construed to mean that possession is evidence not only of the fact of unlawful purchase, but that the place of purchase is that in which the accused is found in possession, the proof was probably insufficient to show that the purchase had been made within the district. The bill of exceptions shows that at the close of the evidence (R. 83) the

> defendant challenged the sufficiency of the evidence and requested the court to instruct the jury to return a verdict of Not Guilty on Count 1 of the indictment,

and the failure to so direct a verdict on Count 1 was assigned as error in the Circuit Court of Appeals (R. 16). The bill of exceptions does not disclose that in making the motion for instructed verdict on Count 1 the petitioner mentioned the matter of venue, but the request was broad enough to cover the point. Express reference to venue first appears in the record in the motion for new trial. (R. 9.)

Under Count 2 there was no proof of importation, manufacture, or compounding of drugs. The

only evidence of dealing in drugs was that above mentioned, showing sales of drugs not in or from the original stamped package. Such proof of dealing in drugs as was produced showed dealing in unstamped drugs. No attack on Count 2 of the indictment was made until after verdict, when the insufficiency of the indictment was asserted in a motion for arrest of judgment. (R. 4.) At the close of the evidence a request for an instructed verdict was made as to Count 2 (R. 84), and the failure to grant it was assigned as error (R.13).

Petitioner's point about Count 2 is that the statute requires only those who sell or dispense from original stamped packages to register and pay the tax, and that as Count 2 did not allege, and there was no proof, that the petitioner was dealing in drugs in original stamped packages, the conviction under Count 2 for failing to register and pay the dealer's tax can not be sustained.

SUMMARY OF ARGUMENT

I. Count 2 of the indictment charged a failure to register and pay the tax as a dealer. The statute expressly provides that only those who sell or dispense the drugs from original stamped packages are dealers and required to pay the occupation tax. In this case there was no proof that the accused was dealing in stamped drugs. The evidence showed that he dealt in unstamped drugs, and the verdict of guilty under Count 1 was based on that fact.

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Under these conditions the conviction under Count 2 should not be sustained.

II. Count 1 charged purchase of drugs not in or from the original stamped package. Proof of purchase consisted in proof of possession of unstamped drugs, and under the statute possession of unstamped drugs is *prima facie* evidence of the fact of unlawful purchase. There was no proof of the place of unlawful purchase other than proof of the place of possession and the inference to be drawn therefrom. The statute, making possession of unstamped drugs *prima facie* evidence of purchase of unstamped drugs, should be construed to make possession within the district *prima facie* evidence not only of the fact of unlawful purchase, but that the place of unlawful purchase was where possession was had. Although the statute does not expressly state that possesion shall be *prima facie* evidence that the purchase took place where possession exists, the provision in the statute that possession is *prima facie* evidence of unlawful purchase would be completely nullified if it does not cover the question of venue. If the prosecution is required to prove the place of purchase, in doing so it would have to prove the fact of purchase, and the presumption created by the statute becomes a dead letter. The statute should therefore not be construed to destroy its own effectiveness.

Construed as here contended, the statute is not unconstitutional. There is as much rational connection between the fact of possession of unstamped

drugs and the ultimate fact presumed, where the ultimate fact is the place of purchase, as where it is the fact of purchase. There is nothing unreasonable in the presumption that the unlawful purchase has taken place in the district in which the accused is found in possession of the unstamped drugs.

ARGUMENT

I

THE CONVICTION UNDER COUNT 2 CAN NOT BE SUSTAINED

Under Count 2 the petitioner was charged with manufacturing, producing, dealing in and dispensing morphine without having registered and paid the special tax imposed by law. The tax referred to was the occupation tax on importers and dealers. The evidence fails to show any manufacturing or importing, and showed only dealings in drugs in or from unstamped packages. Indeed, the verdict of guilty under the first count determined that the transactions were in unstamped packages. The statute expressly provides that the dealer's tax shall be paid only by those who sell or dispense in or from original stamped packages. After providing, generally, that those who import, manufacture, deal in or dispense drugs shall pay the special taxes provided, the Act defines an importer as one "who imports, manufactures, compounds, or otherwise produces for sale or distribution any of the aforesaid drugs." For obvious reasons, the law does

not require that an importer or manufacturer must import or manufacture stamped drugs to become liable to the special occupation tax, as the drugs are not stamped until they are imported or manufactured, but the definitions of wholesale and retail dealers are different in this respect. They provide that every person who sells or offers for sale any of said drugs in or from the original stamped packages, shall be deemed a wholesale or retail dealer, as the case may be, and the provision creating a presumption resulting from possession is that—

> the possession of any *original stamped package* containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by this section shall be prima facie evidence of liability to such special tax. (Italics ours.)

The terms of the statute are therefore explicit in providing that only those who sell in or from the original stamped packages must pay the special occupation tax. Since in this case the indictment did not allege and the proof did not show that the petitioner was dealing in drugs in or from stamped packages, a conviction under Count 2 can not be sustained.

The Circuit Court of Appeals does not mention this question in its opinion, but disposes of the second count by the statement (R. 110):

> Upon the second count the evidence, though conflicting, is ample to support the verdict.

The Circuit Courts of Appeals for the Sixth and Eighth Circuits have held that one dealing in drugs not in or from the original stamped packages is not required by the Act to pay the special tax. *Weaver* v. *United States,* 15 F. (2d) 38; *O'Neill* v. *United States,* 19 F. (2d) 322; *Butler* v. *United States,* 20 F. (2d) 570. We see no reason to doubt the soundness of these decisions.

The record shows that at the close of the evidence the petitioner requested the court to instruct the jury to return a verdict of "Not guilty" on count 2 (R. 84) for insufficiency of the evidence, and the point is covered by the assignments of error (R. 16).

II

THE STATUTE SHOULD BE CONSTRUED TO MAKE POSSESSION OF UNSTAMPED DRUGS PRIMA FACIE EVIDENCE OF THE PLACE AS WELL AS THE FACT OF UNLAWFUL PURCHASE, AND SO CONSTRUED IT IS NOT INVALID

With Count 2 furnishing no basis for sustaining the judgment, the consideration of Count 1 remains, and the single point under it is whether the proof showed that the offense was committed within the district. The charge in Count 1 was purchase of drugs not in or from stamped packages. The proof showed possession of drugs not in stamped packages. To sustain the charge of unlawful purchase the United States was obliged to rely upon the presumption created by that part of the statute to the effect that—

> the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be

> prima facie evidence of a violation of this section by the person in whose possession same may be found.

Proof of possession of unstamped drugs, therefore, was sufficient to raise the presumption of the fact of unlawful purchase, but the question is whether the presumption includes not only the fact of purchase but the place of purchase, so as to support the venue.

The Circuit Court of Appeals for the Eighth Circuit in *Brightman* v. *United States,* 7 F. (2d) 532, and in *Cain* v. *United States,* 12 F. (2d) 580, has held that the presumption arising from the possession of untax-paid narcotic drugs does not extend to the place of purchase, and that it is necessary for the prosecution to prove, without regard to the statutory presumption, the fact that the unlawful purchase took place within the district.

The Circuit Court of Appeals for the Seventh Circuit in *DeMoss* v. *United States,* 14 F. (2d) 1021, has followed the decision in the Eighth Circuit.

In the present case the Circuit Court of Appeals for the Ninth Circuit has held the other way. It said (R. 110):

> While defendant's contention is not without support in the decided cases * * *, to grant it would seem to rob the statute of all efficacy. If independently of the statutory presumption, the Government must affirmatively prove the place of purchase, it

> must also by like evidence prove the substantive fact of purchase, for how the place of purchase can be established without at the same time proving the purchase, is not apparent. Fairly construed, the statute in our opinion extends the presumption to the incidental matter of place as well as the substantive matter of purchase.

The question is one of statutory construction, and whether Congress meant that although possession of unstamped drugs is prima facie evidence of the fact of unlawful purchase it is nevertheless necessary for the prosecution to furnish proof beyond the fact of possession in the district that the unlawful purchase took place within the district. The statute does not expressly state that possession shall be prima facie evidence that the unlawful purchase took place where the possession occurred, but it is clear that the provision in the statute that possession is prima facie evidence of unlawful purchase would be completely nullified if it does not cover the question of place and venue. It would be a rare case where the prosecution could prove the place of an unlawful purchase without at the same time proving the fact of the unlawful purchase, and if the fact of purchase must be proved the statutory presumption is worthless. Although the statute is not fortunately worded, we invoke the rule that a statute should not be given a construction producing unreasonable results if it may be avoided. *United States* v. *Katz,* 271 U. S. 354.

The statute should not be construed to destroy its own effectiveness. It should be construed to mean that possession of unstamped drugs is prima facie evidence of the fact of unlawful purchase in the district where the possession is shown to have occurred.

So construed the statute is not unconstitutional. In *Mobile, etc., R. R.* v. *Turnipseed,* 219 U. S. 35 (43), it was said—

> That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.

A legislative presumption of one fact from evidence of another may properly relate to the place of the offense as well as to the fact of the offense, and in this respect the question of venue under the Sixth Amendment is not different from any other question of fact required to be established to convict. There is a rational connection between the fact of possession of unstamped drugs, presumed to have been unlawfully purchased, and the fact of purchase at or near the place where the possession is shown. The facts of the present case illustrate the reasonableness of this presumption. The peti-

tioner was a resident of King County, Washington, and conducted his business there and made frequent visits to persons in the King County Jail for the purpose of supplying them with drugs. There is no suggestion that he was in transit through the district or had been out of it, and if the fact of unlawful purchase of drugs is to be presumed from his possession within King County of unstamped drugs, it is not unreasonable to assume that he purchased the drugs in King County. That the fact presumed need not be one of inevitable inference from the fact proven is disclosed in *Yee Hem* v. *United States,* 268 U. S. 178, 185, where it was said—

> * * * If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not resting upon statute. See *Dunlop* v. *United States,* 165 U. S. 486, 502–503; *Wilson* v. *United States,* 162 U. S. 613, 619. In the *Wilson* case the accused, charged with murder, was found, soon after the homicide, in possession of property that had belonged to the dead man. This court upheld a charge of the trial court to the effect that such possession required the accused to account for it, to show that as far as he was concerned the possession was innocent and honest, and that if not so accounted for it became "the foundation for a presumption of guilt against the defendant."

See also *O'Neill* v. *United States*, 19 F. (2d) 322, 328.

The venue point was sufficiently raised by motion to direct a verdict. While the record does not show that it was or was not mentioned expressly in pressing the motion it was called to the attention of the trial court in a motion for new trial.

If the statute be construed as is here contended for, there was sufficient evidence to sustain the conviction under Count 1 and the judgment should be affirmed.

Respectfully submitted.

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JANUARY, 1928.

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